



## State of Idaho

# DEPARTMENT OF WATER RESOURCES

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C.L. "BUTCH" OTTER  
Governor

GARY SPACKMAN  
Director

May 2, 2013

Roger Totten  
Watermaster, Water District 34  
P.O. Box 53  
Mackay, ID 83251

### Re: Fulfilling Requests for Mitigation pursuant to IDAPA 37.03.12.050

Dear Mr. Totten:

The purpose of this letter is to provide guidance regarding the mitigation request you received from a number of users, dated April 15, 2013. The Idaho Department of Water Resources (IDWR) received a copy of this mitigation request on April 19, 2013.

The water rights for which flow augmentation has been requested pursuant to IDAPA 37.03.12.050 (Rule 50) are listed in the attached Table 1. Some of the water rights have combined limits with ground water rights and/or overlapping places of use with groundwater rights or other surface water rights. Nevertheless, Rule 50 does not preclude such rights from calling for or receiving flow augmentation.

The attached Table 2 sums the mitigation requests by priority and canal. The purpose of the flow augmentation request is to supply an amount of water to those users calling for augmentation that would have been present absent pumping by junior groundwater users. The actual amount of natural flow that would have been available is unknown, so we rely on the amount established in Rule 50.

The required mitigation may be fulfilled by the water district, an organization of ground water users, or a combination thereof. IDWR will issue a notice to ground water users informing them of their obligations and options pursuant to this rule.

Rule 50 provides two options for fulfilling the request for mitigation when formulating a mitigation plan, either by the district or by a group of groundwater users.

- 1. Augment the natural flow available to the rights calling for mitigation during the period when those rights are not otherwise deliverable, but would have had a full supply absent pumping by junior groundwater pumpers.** While the actual amount that would have been available is unknown, Rule 50 establishes upper bounds on the amount and timing of natural flow augmentation. Rule 50.04(c) establishes a river depletion of 6,110 AF<sup>1</sup> and Rule 50.04(c).i establishes the timing that the depletion occurs. In other words,

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<sup>1</sup> Water District 34 assessments over the past 5 years show ground water use in the water district has been significantly higher than the 47,000 AF cited in rule 50.04(c). The average annual volume assessed between 2009 and 2013 (reflecting diversions made in 2008 through 2012), is approximately 68,000 AF. This is an increase of about 45% from the annual volume estimated in Rule 50.04.c. Despite the increase in groundwater usage, calls for mitigation have not been made in recent years and the procedure for modifying the annual diversion volume specified in Rule 50.04.c has not been pursued. The 47,000 AF estimate of ground water withdrawal and the 13% estimated annual depletion described in Rule 50.04.c will thus remain in effect for this year.

these rules establish the otherwise unknown amount of water that would have been available absent pumping by junior groundwater users. However, Rule 50.04(c).ii clarifies that the amount of augmentation to be provided to those users that have called for augmentation is limited to the extent of their water right, to the extent that their water right can be filled by augmentation of natural flow within the amount and timing outlined in 50.04(c) and 50.04(c).i.

Rule 50.04(c).iii provides that the natural flow augmentation can be provided either by recharge efforts, or by adding water to the Big Lost River anywhere between Mackay Dam and the Arco Diversion in an amount adequate to provide the required mitigation at the user's point of diversion, or by adding water directly to canals or laterals that can be used to deliver water to the applicable places of use. Flow will need to be augmented each day during the 2013 irrigation season that water delivery is called for and the natural flow is not otherwise available to fulfill the water rights calling for mitigation. However, not all rights calling for mitigation will receive augmentation throughout the season, as the upper limit of flow augmentation established in Rules 50.04(c) and 50.04(c).i may be exceeded by the demand for mitigation water. Additionally, water added to augment the flow of the river may be subject to appropriate conveyance losses between the point of injection to the river and the canal heading. Such losses may reduce the amount of water available at a canal heading for mitigation purposes. Furthermore, delivery of mitigation water to water right holders on a canal operated by the Big Lost River Irrigation District is subject to conveyance losses through the canal as determined by the Big Lost River Irrigation District.

2. **Submit an alternative mitigation plan(s) (Rule 50.04.e), which identifies actions and measures to prevent or compensate for impacts to diversions by junior ground water users, to the director for consideration pursuant to IDAPA 37.03.11.043.** Alternative mitigation plans could include monetary compensation, partial fulfillment of the flow augmentation requirements combined with a partial reduction in ground water use, non-use of wells, or other combinations of actions that prevent or compensate for the impacts.

Per Rule 50.04.d, Water District 34 is authorized to acquire water supplies to augment natural flow and add the cost of acquiring mitigation water to the annual assessment of ground water users who do not provide separate augmentation or a separate mitigation plan. If the water district opts to fulfill the mitigation requirement, Rule 50.40.d states that the cost would be added to the annual assessment in the same proportion as each ground water user is assessed for the costs of the water district relative to all other ground water users. The Department believes the rule authorizing the water district to acquire the water supplies was intended to promote that approach as the primary means of acquiring and supplying augmentation. This method of acquiring and providing augmentation is easier and more economical to administer and enforce as compared to the alternative (i.e. large numbers of individual mitigation plans). Given the limited resources of the Department and the water district to review and enforce many small plans, the Department encourages the water district to pursue acquiring the water.

If the water district opts to fulfill the mitigation requirement, the water district will need to notify individual ground water users that they will be assessed for mitigation costs, unless they collectively provide separate augmentation or a separate mitigation plan that is acceptable to the director of IDWR.

If the water district needs to issue a separate assessment prior to the next annual assessment in order to provide funds for acquiring mitigation water, the water district could call a special meeting of the water users to approve a supplemental budget.

If the mitigation requirements under IDAPA 37.03.12.050 are not fulfilled by the junior ground water users, either as participants in a plan operated and funded by Water District 34, or an alternate plan, the water users calling for mitigation can seek regulatory relief by filing a petition with the

director of IDWR requesting curtailment of junior ground water users pursuant to Rule 40 of the "Rules for Conjunctive Management of Surface and Ground Water Resources," IDAPA 37.03.11.

If the water district opts to acquire water to satisfy the mitigation requirement, you must submit a plan to IDWR by May 17, 2013 outlining a proposal to acquire the necessary water and supply it to those calling for mitigation. If the water district declines or is unable to acquire the water supplies, please let us know as soon as possible to provide junior groundwater users an opportunity to provide separate augmentation or an alternative mitigation plan.

If you have any questions regarding this letter please contact me at 208-287-4956 or Tim Luke at 208-287-4959.

Respectfully,



Nick Miller  
Water Distribution Section

cc: Seth Beal, Water District 34 Advisory Committee Chairman  
Kenneth Bell  
Marc Hansen and Bruce Jacobs  
James Rindfleisch  
Mark Roberts  
Josephine Spraker  
Harvey Walker  
Reva Walker  
Big Lost River Irrigation District  
IDWR Eastern Region

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**Table 1. Rights calling for mitigation sorted by owner**

Owner	Right No.	Rate MI	Rate cfs	Priority Date	Diversion
Kenneth Bell	34-418B	80	1.6	5/1/1892	MUNSEY/MILLER
	34-518	320	6.4	6/30/1890	MUNSEY/ MILLER
Marc Hansen and Bruce Jacobs *	34-14316	52	1.04	9/24/1900	MCLAUGHLIN
	34-14318	37.5	0.75	10/2/1885	MCLAUGHLIN
	34-33	40	0.8	10/2/1885	MCLAUGHLIN
James Rindfleisch*	34-14299	8	0.16	6/1/1880	ARCO
	34-14301	97	1.94	10/2/1885	ARCO
Mark Roberts***	34-394C	30	0.6	6/1/1890	ARCO
Josephine Spraker***	34-106	11	0.22	6/1/1887	ARCO
	34-108	80	1.6	7/1/1887	ARCO
	34-109	23	0.46	8/1/1888	ARCO
	34-179	65	1.3	7/1/1887	ARCO
	34-302	106	2.12	4/22/1889	EASTSIDE
	34-487	65	1.3	10/20/1901	ARCO
	34-521	115	2.3	6/1/1887	ARCO
	34-904	60	1.2	5/1/1886	MOORE
Harvey Walker	34-10476	37	0.74	5/1/1885	ARCO
	34-10478	80	1.6	5/1/1892	ARCO
	34-10479	180	3.6	10/2/1885	ARCO
	34-3B	70	1.4	6/1/1887	ARCO
Reva Walker	34-789	155	3.1	5/1/1892	EASTSIDE

\* Marc Hansen and Bruce Jacobs (North 40 partners) called for augmentation of 40 miner's inches for water right 34-14318. However, that right has an authorized diversion rate of 0.75 cfs, or 37.5 miner's inches.

\*\*James Rindfleisch called for mitigation of water rights 34-234B and 34-244D. The numbers listed in this table reflect recent renumbering of his rights due to ownership splits.

\*\*\*Josephine Spraker also requested mitigation of water right 34-394, her portion of which right was conveyed to Mark Roberts as 34-394C. Mr. Roberts also called for mitigation under water right 34-394.

**Table 2. Rights calling for mitigation totaled by priority and diversion**

Priority Date	ALL DIVs.		EASTSIDE		MOORE		ARCO		MUNSEY	
	Total	Cum.	Total	Cum.	Total	Cum.	Total	Cum.	Total	Cum.
10/20/1901	1.3	1.3	-	-	-	-	1.3	1.3	-	-
9/24/1900	1.04	2.34	-	-	-	-	-	1.3	1.04	1.04
5/1/1892	6.3	8.64	3.1	3.1	-	-	1.6	2.9	1.6	2.64
6/30/1890	6.4	15.04	-	3.1	-	-	-	2.9	6.4	9.04
6/1/1890	0.6	15.64	-	3.1	-	-	0.6	3.5	-	9.04
4/22/1889	2.12	17.76	2.12	5.22	-	-	-	3.5	-	9.04
8/1/1888	0.46	18.22	-	5.22	-	-	0.46	3.96	-	9.04
7/1/1887	2.9	21.12	-	5.22	-	-	2.9	6.86	-	9.04
6/1/1887	3.92	25.04	-	5.22	-	-	3.92	10.78	-	9.04
5/1/1886	1.2	26.24	-	5.22	1.2	1.2	-	10.78	-	9.04
10/2/1885	7.09	33.33	-	5.22	-	1.2	5.54	16.32	1.55	10.59
5/1/1885	0.74	34.07	-	5.22	-	1.2	0.74	17.06	-	10.59
6/1/1880	0.16	34.23	-	5.22	-	1.2	0.16	17.22	-	10.59

**07. Mackay Dam Minimum By-Pass.** Mackay Dam and Reservoir shall be operated to maintain a minimum flow of fifty (50) CFS at the 2-B gage. (10-26-94)

**08. Canal or Lateral Delivery.** In the event a water user feels inappropriate delivery of natural flow water is occurring on any lateral or canal, the water user can request the watermaster to investigate. In the event the watermaster determines that delivery of natural flow water rights within a lateral or canal is being improperly conducted he shall: (10-26-94)

**a.** Notify the ditch rider and the water delivery entity of the results of his investigation and coordinate efforts to make proper delivery of the natural flow. (10-26-94)

**b.** If the situation has not been sufficiently resolved within twenty-four (24) hours the watermaster will notify the director who may take all actions authorized by law to remedy the situation. (10-26-94)

**041. -- 044. (RESERVED)**

**045. ADMINISTRATION OF GROUND WATER RIGHTS (RULE 45).**

Administration of ground water rights is based upon the list of water rights approved for interim administration by the court or as subsequently decreed by the court in the SRBA. Should curtailment of ground water rights become necessary to protect a senior ground water right(s), administration will be based upon reasonable pumping levels and the prior appropriation doctrine as required by law. (10-26-94)

**046. -- 049. (RESERVED)**

**050. CONJUNCTIVE ADMINISTRATION OF GROUND AND SURFACE WATER RIGHTS (RULE 50).**

**01. Conjunctive Administration -- Exceptions.** All ground water rights shall be administered conjunctively as part of the Big Lost River and tributaries unless the ground water user can show to the satisfaction of the director, that due to well construction or location, the diversion of ground water from a particular point of diversion does not reduce the flow of the Big Lost River above the last (most downstream) diversion from the Big Lost River. An exception to conjunctive administration in Water District 34 exists for those ground water rights in the list of water rights containing a remark noting that the right will be administered as separate from the Big Lost River and its tributaries. (10-26-94)

**02. Water Rights Not Subject to Administration.** Small domestic and stock water rights from ground water are not subject to administration at this time; however, these rights may be made subject to administration in the future to provide water to senior water rights from the water system. (10-26-94)

**03. General Rule.** Data currently available to IDWR shows ground water rights that are to be administered conjunctively with surface water deplete the flows of the Big Lost River downstream from Mackay Dam. Surface water users with water rights from the Big Lost River with points of diversion downstream from Mackay Dam are not required to seek curtailment of or mitigation by junior ground water rights and may develop water rights to supplement their Big Lost River water rights as provided by law. (10-26-94)

**04. Mitigation/Augmentation.** Water users with water rights whose source is Big Lost River with their point of diversion downstream from Mackay Dam who seek to have the water supply for their water right augmented to provide for their water right the water supply that would have been available for diversion absent the diversion of ground water under junior water rights shall request mitigation pursuant to this rule. Water users who seek such mitigation from ground water users must notify the watermaster at the time those water users make their initial request to the watermaster for delivery of their water right of their desire for mitigation. Mitigation of the effects of ground water diversion, when requested, will occur as more fully described below. (10-26-94)

**a.** Mitigation will not occur prior to May 1 or after October 15 of any year. (10-26-94)

**b.** Mitigation will be available to water rights with 1905 and earlier priority dates. (10-26-94)

c. Water rights will be eligible to receive mitigation through augmented natural flow water supply based upon a river depletion due to ground water diversions currently estimated to be thirteen percent (13%) of the average annual diversion from wells subject to conjunctive administration currently estimated to be forty-seven thousand (47,000) AFY or a depletion of six thousand one hundred ten (6,110) AFY. The estimated percentage of depletion and annual volume of diversion from wells will be reviewed annually by the director and modified as data becomes available to refine these estimates. Any revised estimate of depletion or annual diversion shall be presented to the water users at the annual meeting of Water District 34 prior to adoption of the values by order of the director.

(10-26-94)

i. Natural flow will be assumed to be augmented by one-third (1/3) of the depletion during the first one-half (1/2) of the period of time that any 1905 or earlier water right being called for can not be filled by the natural flow through October 15 of each year. Natural flow will be assumed to be augmented by two-thirds (2/3) of the depletion during the second one half (1/2) of this period each year.

(10-26-94)

ii. Water users who have requested mitigation and who have water rights being called for that could be filled by augmentation described in Rule Subsection 050.04.c.i shall be provided with water by augmenting the natural flow to the extent of their water right or the amount of water described in Rule Subsection 050.04.c.i., whichever is less.

(10-26-94)

iii. Augmentation of natural flow for purposes of mitigation may be accomplished by making additional water available for diversion from the Big Lost River, including increased river flows resulting from recharge efforts approved by the director, or by adding water to canals or laterals.

(10-26-94)

iv. In any year in which the ground water users believe the annual diversion from ground water for the year will be significantly less than the estimated annual diversion from ground water described above, the ground water users may present their evidence of the anticipated diversions to the director by May 1 of the year along with a request to modify the estimated annual diversion for the year. Upon a determination by the director, based upon the information presented by the ground water users, that the annual diversion from ground water for the year being considered will be less than the annual average, the director will set an estimated ground water diversion for the year to be used for conjunctive administration as described in this rule.

(10-26-94)

d. Water District 34 is authorized to acquire, through the watermaster, water supplies necessary to augment natural flow for mitigation purposes as described in this rule. The watermaster will add the cost of acquiring the mitigation water to the annual assessment of ground water users subject to conjunctive administration, who do not provide separate augmentation pursuant to Rule Subsection 050.04.c.iii. or separate mitigation pursuant to a plan approved as provided by Rule Subsection 050.04.e., in the same proportion as each ground water user is assessed for the costs of the water district relative to all other ground water users. Ground water users who fail to pay the assessed costs for acquiring mitigation water shall be penalized in the same manner as any other water user failing to pay any water district assessment.

(10-26-94)

e. Junior ground water users may submit an alternative mitigation plan(s), which identifies actions and measures to prevent or compensate for impacts of diversions by the junior ground water users, to the director for consideration pursuant to Rule 43 of the "Rules for Conjunctive Management of Surface and Ground Water Resources," IDAPA 37, Title 03, Chapter 11.

(10-26-94)

**05. Direct Interference.** This rule does not prevent a senior surface water user from seeking curtailment and/or damages from a junior ground water user when the senior surface water user can show direct identifiable impact on the water supply for the senior water right as a result of the diversion of water pursuant to the junior ground water right.

(10-26-94)

**051. -- 054. (RESERVED)**

**055. WATER USAGE (RULE 55).**

**01. Firefighting Purposes.**

(10-26-94)

a. Firefighting purposes is an alternate use to which any water right may be put, and firefighting is